Iowa Parcel Service, Inc. and Iowa Express Distribution, Inc. and William K. Walker, an Individual and Alter Ego *and* General Team and Truck Drivers, Helpers and Warehousemen, Local Union No. 90, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* General Drivers & Helpers Union, Local No. 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 18-CA-7146(E) and 18-CA-7369(E) (formerly 17-CA-10420)

March 7, 1983

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND HUNTER

On October 28, 1982, Administrative Law Judge Michael O. Miller issued the attached Supplemental Decision in this proceeding. Thereafter, the Applicant, Iowa Express Distribution, Inc., filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

It is hereby ordered that the application of the Applicant, Iowa Express Distribution, Inc., Des Moines, Iowa, for an award under the Equal Access to Justice Act be, and it is hereby is, dismissed.

[1] In affirming the Administrative Law Judge's dismissal of the "Application for Attorney's Fees and Expenses," we do not adopt his findings regarding the conduct or sufficiency of the General Counsel's investigation in the underlying unfair labor practice proceeding.

SUPPLEMENTAL DECISION

(Equal Access to Justice Act)

On July 9, 1982, the National Labor Relations Board, herein called the Board, issued its Order in the above-entitled proceeding[1] adopting the findings and conclusions of this Administrative Law Judge as contained in his Decision dated June 2, 1982,[2] and, *inter alia*, dismissing "that portion of the complaint alleging that Respondent Iowa Express Distribution, Inc., committed unfair labor practices . . . ." On July 23, 1982, Iowa Express Distribution, Inc., herein called the Applicant, timely filed an application for attorney fees and expenses under the Equal Access to Justice Act, herein called EAJA,[3] and Section 102.143 of the Board's Rules and Regulations.

The Applicant asserts that it was a prevailing party in an adversary proceeding before the Board. It further asserts, and supports said assertions with appropriate affidavits and financial reports, that it is an Iowa corporation, engaged in the intrastate and interstate delivery of freight and commodities, employing less than 500 employees and having a net worth of less than $5 million. Attorneys fees and expenses totaling $26,686.95,[4] incurred in defending against the General Counsel's allegations, is sought.

On August 20, 1982, the General Counsel filed a motion to dismiss application for an award of fees and expenses under the Equal Access to Justice Act, contending that (1) the General Counsel's position in the litigation was substantially justified notwithstanding the ultimate dismissal of its allegations against Applicant; (2) Applicant is not entitled to expenses incurred prior to October 1, 1981, the effective date of EAJA; (3) Applicant is not entitled to expenses incurred prior to the issuance of complaint; (4) the application is deficient in that it contains no itemization of expenses incurred solely in connection with the unfair labor practice complaint proceeding; and (5) Applicant is not entitled to expenses incurred in the preparation of its EAJA application. Applicant filed a response to the motion to dismiss on September 8, 1982.

The Substantial Justification Question

Section 504(a)(1) of EAJA provides that an award shall be made to a prevailing party unless "the position of the agency as a party to the proceeding was substantially justified or . . . special circumstances make an award unjust." The burden of establishing substantial justification is on the Government and the test of whether or not governmental action is substantially justified is one of reasonableness. The Government, to defeat an award, must establish that its position had a reasonable basis in fact and law. However, the fact that the Government lost its case does not give rise to any presumption that its position was unreasonable and the "substantially justified" standard does not "require the Government to establish that its decision to litigate was based on a substantial probability of prevailing."[5] Moreover, as the Board has recently pointed out, the Government's position might still be deemed reasonable in fact and law not-

[1] Unpublished.

[2] JD-238-82.

[3] P.L. 96-481, 94 Stat. 2325.

[4] As amended by Applicant's response to the General Counsel's motion to dismiss.

[5] S. Rept. No. 96-253, 96 Cong., 1st sess. 6-7, 14-15 (1979); H.R. Rept. No. 96-1418, 96th Cong., 2d sess. 10-11 (1980); *Spencer* v. *N.L.R.B.*, 111 LRRM 2065, 2066 (D.C. Cir. 1982).

withstanding that the General Counsel failed to establish a *prima facie* case.[6]

The General Counsel's consolidated complaints allege that Iowa Parcel Service, Inc. (herein called IPS), William K. Walker, and the Applicant, as *alter egos* and as a single employer, violated Section 8(a)(1), (3), and (5) of the Act by locking out and discharging the IPS employees in Des Moines, Iowa, closing the Des Moines facility, and transferring some of the IPS operations to Applicant while failing and refusing to continue in effect the collective-bargaining agreement which existed between IPS and General Team and Truck Drivers, Helpers and Warehousemen, Local Union No. 90, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The complaints further allege that as *alter egos* and a single employer, these employers closed their Omaha, Nebraska, facility, transferred the work of the employees of that facility to the Applicant, discharged the Omaha employees and failed and refused to recognize and bargain with General Drivers & Helpers Union, Local No. 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, in violation of Section 8(a)(1), (3), and (5) of the Act. IPS and Walker did not respond to the complaints' allegations. No answers were filed by them, no representative appeared on their behalf at the hearing held on January 11–14, 1982, and no defense was proffered. Based upon the uncontroverted allegations of the complaints and the record as developed by the General Counsel and the Applicant herein, I found that IPS and Walker had locked out the Des Moines and Omaha employees in violation of Section 8(a)(3), "permitted or encouraged the transfer of a portion of bargaining unit work to [the Applicant] without notice to or bargaining with the Union" in violation of Section 8(a)(5), and further violated Section 8(a)(5) by completely abrogating its collective-bargaining agreement with Local 90. I recommended dismissal of the complaint allegations alleging that IPS had violated Section 8(a)(3) and (5) by its discharge of employees on April 14, 1981, noting that the record had conclusively established that IPS and Walker had gone completely out of business on that date.[7] I further found that the evidence, "while warranting grave suspicion," failed to establish that the Applicant was the *alter ego* or a single employer with IPS and Walker and recommended that the complaint's allegations, insofar as they pertained to the Applicant, be dismissed. No exceptions to my Decision and recommended Order were filed and my findings, conclusions, and recommended Orders were adopted by the Board.

In support of its contention that the General Counsel's allegations against it did not possess a reasonable basis in law and fact, the Applicant asserted, in its Application and in its response to the General Counsel's motion to dismiss, the following: (1) the General Counsel issued its complaint alleging that the Applicant was an *alter ego* of IPS and Walker within a week after the filing of amended charges naming, for the first time, the Applicant as a party respondent, without attempting to interview or obtain affidavits from Applicant's officers or agents in the investigation of those amended charges; (2) Applicant submitted a detailed statement of its factual and legal position to the General Counsel shortly after the issuance of the complaint in Case 18-CA-7146 and 7 months prior to the hearing herein, wherein it indicated its willingness to cooperate in any investigation of the charges; (3) no response to its offer of cooperation was made by the General Counsel; (4) the General Counsel had in its possession or available to it public and other documents, including decisions of the Iowa Transportation Regulation Board and orders of that agency and the Interstate Commerce Commission, establishing the independence of Applicant from IPS and Walker; and (5) the evidence possessed by the General Counsel and introduced at the hearing was insufficient, "as a matter of law, . . . to establish *alter ego*, single employer or disguised continuation status." In regard to the latter contention, the Applicant argues that the legal prerequisites to establish such status, particularly "substantially identical ownership, management, operations, facilities and equipment, customers and control of labor relations" are settled and well established in Board and court decisions. The General Counsel contends that the case it presented involved bona fide credibility issues warranting a hearing, including evidence from which I could have inferred that the Applicant "was created as a disguised continuance of IPS as part of an unlawful scheme," and presented "in good faith a close question of law or fact" which would bar the granting of an award.[8]

The General Counsel did not dispute the Applicant's contention that it undertook no investigation wherein it sought to ascertain evidence or positions from the Applicant either before or after issuance of the complaint. Neither did the General Counsel offer any explanation for its failure to conduct such an investigation. On the state of this record, then, I am compelled to accept the Applicant's contentions in this regard. While this failure to pursue all reasonable avenues of investigation prior to litigation is regrettable, contrary to the Board's Regulations (Sec. 101.4) and the instructions contained in the General Counsel's Casehandling Manual (Sec. 10056.4 and 10056.5) and certainly not to be condoned, I must conclude that the evidence which the General Counsel had in its possession justified its issuance of the complaint against the Applicant as well as IPS and Walker and warranted litigation. Thus, the General Counsel had evidence of, and established, the following: The Applicant was formed by two high-ranking and long-term managerial employees of IPS, Sternberg and McElroy; Sternberg had been listed as a vice president of IPS in an IPS annual report to the Iowa Department of Transportation; Applicant's formation occurred while IPS was still in business, with Walker's blessings; Walker provided the initial financing for the Applicant with unsecured and initially undocumented no-interest loans; Walker had expressed an attitude toward his unionized

[6] See *Enerhaul, Inc.*, 263 NLRB 890 (1982).

[7] *First National Maintenance Corporation* v. *N.L.R.B.*, 452 U.S. 666 (1981); *Textile Workers Union of America* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965).

[8] 126 Cong. Rec. H10226 (daily ed. October 1, 1980), the remarks of Rep. Neal Smith, Chairman of the Committee on Small Business.

employees from which one could conclude that he would have gone to almost any length to achieve his objectives in regard to them; the Applicant solicited certain of IPS' customers for their business, again while IPS was still in business and with Walker's knowledge and consent; the Applicant was engaged in an enterprise identical in type if not in scope to a portion of IPS' operations; the Applicant hired IPS' night supervisor, Clark, as its operations manager and Clark did the Applicant's hiring prior to the termination of IPS' business operations; the Applicant avoided hiring any of the former IPS employees; the Applicant contracted with IPS' insurance agent for coverage on its operations and there was some evidence from which it appeared that the Applicant initially operated under the IPS insurance policies; the Applicant began its business operations utilizing some equipment from the IPS operations; and, Walker, as well as Sternberg, McElroy, and Clark, made statements to others indicating that the Applicant was Walker's company and only a device to hold on to certain pool shipment business until Walker was able to achieve his objectives *vis-a-vis* the Unions. Additionally, the General Counsel adduced evidence which, if credited, would have shown that Sternberg had encouraged and assisted Walker to acquire IPS and that McElroy had told the president of Local 90, long before the advent of the Applicant, that IPS had a plan to start another company. I found it unnecessary to resolve the question of Sternberg's alleged encouragement of Walker's acquisition of IPS and credited McElory's denial of the latter statement attributed to him.

At the same time, the General Counsel possessed or had available to it evidence establishing that while IPS was a multimillion dollar, multifaceted trucking concern operating approximately 100 vehicles and serving approximately 4,800 customers from substantial terminal facilities, the Applicant served only five customers with four vehicles and grossed only $200,000 in its first year of operation. Documentary evidence also established that the Applicant leased property in its own name and invested a substantial sum (for a company so small) in modifying those premises. Additionally, documentary evidence established that neither Sternberg nor McElroy possessed any financial interests in IPS and that Walker was neither an officer, agent, or stockholder of the Applicant. The testimony revealed that neither Sternberg nor McElroy was related to Walker. The evidence, as submitted by the Applicant to the General Counsel following issuance of complaint and as developed at the hearing, established further that while Walker exercised virtual total managerial control over IPS, being involved in all decisions large and small, he exercised no such control over the operations or labor relations policies of the Applicant.

Based upon the foregoing facts, as more fully described in my initial decision, the General Counsel argued in the case-in-chief that Walker had created the Applicant as a "disguised continuance of IPS created to hold the lucrative pool distribution portion of the IPS operations until those operations were resumed." The General Counsel sought a finding that McElroy and Sternberg did not independently form the Applicant but rather decided to continue it in operation after Walker elected to go out of business. The General Counsel pointed, in particular, to the financing provided by Walker, the solicitation of the IPS' customers while IPS was still extant, the Applicant's use of IPS equipment, Walker's animus toward the Union, and the various statements by Walker, McElory, and Sternberg which pointed toward a "disguised continuance." The Applicant argued that a finding of *alter ego* or single employer status was precluded by the absence of evidence of "common or substantially identical ownership, common management, common operations, common facilities, common customers, and common control of labor relations . . . ."

As stated in my initial decision herein:

> To determine whether one legal entity is the *alter ego* of another, the Board looks to the ownership, management, business purpose, operation, equipment, customers and supervision of the two businesses. Where some of these listed indicia are "substantially identical" the Board will find an *alter ego* status. However, not all of these standards have to be satisfied; centralized control of labor relations or identical corporate ownership is not crucial to the finding of an *alter ego. Blake Construction Co., Inc.*, 245 NLRB 630, 634 (1979). See also *Crawford Door Sales Co., Inc.*, 226 NLRB 1144 (1976). Identical corporate ownership is not the *sine qua non* of *alter ego* status; however, the presence of "substantially identical" ownership between the two enterprises is a prerequisite to a conclusion that such status exists. *Mortons I.G.A. Foodliner*, 240 NLRB 1246, fn. 2 (1979); *Crawford Door Sales, supra*. The term "disguised continuance" is another way of describing an *alter ego* and the legal requirements to establish the former are identical to those required to establish the latter. In *Howard Johnson Co.* v. *The Detroit Joint Board*, 417 U.S. 249, 259, fn. 5 (1974) the Supreme Court stated that *alter ego* or disguised continuance "cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." See also *Marquis Printing Corporation*, 213 NLRB 394 (1974).

I found, as previously stated, that the "facts here, while warranting grave suspicion, fail to establish *alter ego* status. The essential element, a substantial identity of ownership, [is] lacking." The interest-free loan, I found, was not enough to establish the necessary ownership connection. The statements by Walker, McElory, and Sternberg, I found, were probably made in an effort to conceal Walker's true intentions and to blame the Unions for the cessation of his businesses. I further found that there was no evidence of continued managerial control by Walker in the operations of the Applicant.[9]

[9] While my conclusions essentially concurred with those of the Iowa Transportation Regulation Board, they were independently arrived at. *Continued*

Notwithstanding the ultimate rejection of the General Counsel's contentions, as briefly summarized above, I must conclude here that the General Counsel presented, if not a *prima facie* case, a case which still had a substantial basis in fact and law. Thus, it was arguable, and I could have inferred, that Walker's financial support of the Applicant, in light of the statements made by the various participants, gave him continued actual control over the Applicant such as would establish *alter ego* status notwithstanding the absence of other evidence of "substantially identical" ownership. See *Big Bear Supermarkets #3*, 239 NLRB 179 (1978); *Circle T Corporation*, 238 NLRB 245 (1978); and *Ramos Ironworks, Inc.*, 234 NLRB 896 (1978), cited by the General Counsel in its brief in support of the case-in-chief. Those cases, I found, were distinguishable from the instant facts; they did provide, however, a substantial and legitimate basis upon which the General Counsel was privileged to argue for a conclusion of *alter ego* status. See also *American Pacific Concrete Pipe Company, Inc.*, 262 NLRB 1223, 1226 (1982), cited by the General Counsel in its motion to dismiss the EAJA application. Therein, the Board found two employers who had "substantially identical business purpose, operations, equipment, and customers" to be *alter egos* notwithstanding that they "did not . . . share common ownership; nor did they, on paper, share common management or supervision." *Alter ego* status was found in that case based on the actual control exercised by virtue of a lease agreement and involvement by the first employer in the second employer's labor relations. While that case, too, is factually distinguishable from the instant case, that case and the General Counsel's earlier cited cases establish that the General Counsel presented an arguable case and advanced, in good faith, a "novel but credible extension and interpretation of the law." The General Counsel's position was, therefore, substantially justified.[10]

Accordingly, I must conclude that the General Counsel's complaint had a reasonable basis in fact and law, was substantially justified, and that an award of fees and expenses is not warranted. I therefore issue the following recommended:

ORDER

The General Counsel's motion to dismiss application is granted and the application of Iowa Express Distribution, Inc., for attorneys fees and expenses is dismissed.[11]

The findings and conclusions of such an agency, while admissible before the Board, are not entitled to conclusive weight by either the General Counsel or the Board. See *Magic Pan, Inc.*, 242 NLRB 840 (1979).

[10] See S. Rept. 96-253, 96 Cong., 1st sess. 7; H. Rept. 96-1418, 96 Cong. 2d sess. 11.

[11] In view of my disposition of the substantial justification issue, I deemed it unnecessary to reach the additional defenses and arguments raised by the General Counsel in opposition to the application. See *Spencer* v. *N.L.R.B.*, *supra*.